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ALEXANDER L. STEVAS

No. ....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES ANDERSON, Warden,

Petitioner,

v

CORNELL FULLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where the evidence presented in support of Respondent's state court felony murder conviction supports the jury's conclusion that [redacted] intentionally aided the commission of an arson murder by acting as a lookout, was sufficient evidence adduced for a rational trier of fact to find proof of guilt beyond a reasonable doubt?

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OPINIONS BELOW

In 1970 Respondent Fuller was convicted by a jury in the Detroit, Michigan Recorder's Court of felony murder and was sentenced to the mandatory term of life imprisonment. The conviction was affirmed by the Michigan Court of Appeals, *People* v *Fuller*, 44 Mich App 297 (1973) (App. 40a) and by the Michigan Supreme Court, *People* v *Fuller*, 395 Mich 451 (1975) (App. 31a). Respondent sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan which was granted in a Memorandum Opinion and Order filed December 2, 1980 (App. 20a). The judgment granting the writ was affirmed by the United States Court of Appeals for the Sixth Circuit, *Fuller* v *Anderson*, ... F2d .... (September 18, 1981) (App. 1a). By

order of the District Court (App. 30a), as affirmed by the Court of Appeals (App. 28a). Respondent Fuller has been released on bail pending appeal from the District Court's judgment.

JURISDICTION

The opinion of the Court of Appeals which the State seeks to have reviewed was entered September 18, 1981. This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

MCLA 750.71; MSA 28.266:

> "The term 'burn' as used in this chapter shall mean setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading or procuring another to do such act or acts."

MCLA 750.72; MSA 28.267:

> "Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years."

MCLA 750.316; MSA 28.548:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be

committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

MCLA 767.39; MSA 28.979:

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

STATEMENT OF THE CASE

In this habeas corpus proceeding in which the District Court's jurisdiction in the first instance was based upon 28 USC §§ 2241, 2254, the District Court and the Court of Appeals held that despite Respondent Fuller's jury conviction and subsequent affirmance by state appellate courts, his conviction of arson murder was not supported by sufficient evidence for a rational trier of fact to find proof of guilt beyond a reasonable doubt.

On the morning of May 18, 1970, the home of Safronia Turner was destroyed by a fire which was deliberately set. Although Mrs. Turner and several children were able to escape the blaze, two daughters died in the fire and Fuller was charged with the felony murder of one of them, Ruth Turner. It was the prosecution's theory that the fire was caused by a Molotov cocktail thrown against the house by Zerious Meadows and that the Defendant Cornell Fuller aided and abetted the arson by acting in concert with

Meadows and, more particularly, by acting as a lookout while Meadows threw the Molotov cocktail. The defense did not dispute the facts of the crime, but asserted as an alibi the testimony of Fuller's mother that he was home in bed at the time of the offense.

In his opening statement, the prosecutor informed the jury that he intended to prove that Zerious Meadows threw a Molotov cocktail (a gasoline-filled Coke bottle with a lighted rag in it) against the rear of the Turner household, that Meadows also ignited a rug that was at the rear of the house, and that Respondent Cornell Fuller was standing by a gate at the rear of the house looking back and forth, acting as a lookout for Zerious Meadows. Defense counsel's opening statement emphasized the concept of reasonable doubt, urged the jury to carefully weigh credibility of witnesses, improperly informed the jury that a conviction would mean a mandatory sentence of life imprisonment, and emphasized that the defense did not contest the facts of the crime, but rather asserted alibi, Trial transcript 39, 49-50:

> "Ladies and gentlement of the jury, the prosecutor will show that a fire took place and that two people were killed as a result of that fire. Now, the question before this jury is not whether or not two parties died in that incident; the question is who did it?
>
> "• • •.
>
> "Aiding and abetting—aided and abetted—the legal concept, as the court indicated, that would mean somebody that is a party to an incident—I think you are all familiar with that. *You must be firmly convinced that the defendant was the party who aided and abetted in this incident.* There is no question here as to the fact that the incident occurred and the deaths were a result of this in-

cident and the prosecution will show that the burning, in fact, did take place and the deaths were a result of the burning—the burning emanated from an incendiary device, commonly known as a Molotov cocktail. Testimony will be given with regard to a chemical analysis as to what happened. That is not the issue; the issue is the tragic incident, a very sordid situation where the deaths were pitiful. There is no question about that. *The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact that you have to determine.*" (Emphasis added)

The pathologist testified that Ruth Turner suffered second, third and fourth degree burns on more than sixty per cent of her body surface and that the cause of death was asphyxia by smoke and flame, carbon monoxide in her blood, and burns. Captain Marshall Robinson of the Detroit Fire Department, the arson investigator, testified that two fires were set at the rear of the home and that the fires were deliberately set. Portions of a Coke bottle were recovered and the smell of gasoline was present at the scene. Robert Kuntz, a chemist, testified that gasoline was present in portions of the house siding which were recovered from the scene.

Helen Brownlee, who lived next door to the Turners, testified that on the morning in question she saw five or six boys together in a huddle in front of the Turner home and that Respondent Cornell Fuller was among them. She had known him before the incident, since he lived in the neighborhood. She testified that Fuller and one or two of the other boys went through the front gate of the Turner yard to the back of the home. At that time, one of the boys remaining in front threw something, and she yelled at them since she thought they might be throwing something at her

house. She went out of her house, and as she went down her porch steps, Mrs. Turner ran out of her house and Mrs. Brownlee saw that the Turner house was on fire.

Jefferey Coleman testified that on the morning in question he was going to the Turner house to see one of the Turner children when he cut through the back yard of a neighbor's house and approached the Turner household from the rear. He saw Zerious Meadows on the Turner's back porch and saw Respondent Cornell Fuller standing inside the back yard by the gate. Meadows had a Coke bottle in his hand with liquid in it and Coleman saw Meadows light a rag and throw the bottle against the house where it broke and a fire blazed up, and he saw Meadows strike a match and light another fire. Coleman further testified as follows, Trial transcript 215-218:

"Q. Now, after he had struck the match and started the second fire what happened then?

"A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.

"Q. When you say they ran down the alley, who ran down the alley?

"A. Zerious and Cornell.

"Q. Towards Kercheval?

"A. Yes, sir.

"Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

"A. He was still standing by the gate, looking around.

"Q. When you say he was looking around what, exactly, was he doing?

"A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

"Q. He looked towards Jefferson and looked back towards Kercheval?

"A. Yes, sir.

"Q. Did he do that once or more than once?

"A. He did it more than once.

"Q. He did it more than once—how many times—

"THE COURT: Was this the alley gate or the gate toward the front of the house?

"A. It was the alley gate.

"Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

"A. I wouldn't know.

"Q. But it was more than once; is that correct?

"A. Yes, sir.

"Q. Was it more than twice?

"A. Yes, sir.

"Q. Now, during the time that this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

"A. No.

"Q. Did you say anything to them?

"A. No.

"Q. Now, after—strike that please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

"A. Yes, sir.

"Q. Did they enter the alley?

"A. Yes, sir.

"Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

"A. Yes, sir.

"Q. And then they started running; is that correct?

"A. Yes sir.

"Q. Were they running together or separately, Jefferey?

"A. Together.

"Q. And they were running towards Kercheval; is that correct?

"A. Yes, sir."

Gary Martin testified that on the morning in question Jefferey Coleman had stopped by his house and that Martin

was looking out the window when he saw Respondent Cornell Fuller, Zerious Meadows and four other boys in the alley going towards the Turner house. Shortly afterward, he saw them again when they came through a yard and were running toward the alley. Respondent Cornell Fuller and Zerious Meadows were still in the group. A few minutes thereafter, Jefferey Coleman returned and said that the Turner house was on fire. After presentation of the prosecution's case, the defense moved for a directed verdict, but the court reserved its ruling because it concluded that there was sufficient evidence to go to the jury. The sole defense witness was Respondent Fuller's mother who testified that at the time in question Respondent Fuller was at home in bed.

The court instructed the jury, *inter alia*, on reasonable doubt and the presumption of innocence. The jury returned a verdict of guilty after deliberating less than two hours. At sentencing Respondent Fuller moved to set aside the verdict on the ground that the evidence was insufficient to uphold the conviction. The court denied the motion after summarizing on the record some of the evidence adduced to support the conviction, Trial transcript 421-423; App. 43a-45a. Defense counsel later filed a supplemental motion for new trial which the court took under advisement for some time pending completion of a murder trial involving Zerious Meadows. Following Meadows' conviction of first degree murder, the trial court denied Respondent Fuller's supplemental motion for new trial, App. 45a-47a.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS' DECISIONS CONFLICT WITH JACKSON v VIRGINIA, 433 US 307 (1979).

Jackson v *Virginia, supra,* 443 US at 319, 326 requires that in habeas corpus review of a state court conviction the federal court must view the evidence in the light most favorable to the prosecution; must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved conflicting inferences in favor of the prosecution and must defer to that resolution; prohibits a federal court from making its own subjective determination of guilt or innocence; and prohibits the federal court from scrutinizing the reasoning process used by the state court factfinder. In the instant case the federal courts violated these precepts and instead of merely determining whether *any* rational trier of fact *could have* found the essential elements of the crime beyond a reasonable doubt, they impermissibly asked themselves whether *they* believed that the evidence at the trial established guilt beyond a reasonable doubt. *Jackson* v *Virginia, supra,* 443 US at 318-319.

Respondent Cornell Fuller was charged with felony murder which, by Michigan statute, is first degree murder, MCLA 750.316; MSA 28.548. Although the Michigan Supreme Court recently changed the felony murder doctrine in Michigan, *People* v *Aaron,* 409 Mich 672 (1980), at the time of Fuller's trial in 1970, the common-law felony murder doctrine applied and proof of a homicide committed during the perpetration or attempted perpetration of the felony of arson was sufficient to support a conviction of first degree felony murder. Under Michigan law, the felony of arson is defined by statute, MCLA 750.71, 750.72; MSA

28.266, 28.267, as a specific intent crime which requires proof that a burning be done wilfully or maliciously. The prosecution's theory was that although Fuller did not throw the Molotov cocktail or light the fire himself, he was an accessory and therefore criminally liable under the arson statutes and under the statute abolishing the distinction between accessories and principals, MCLA 767.39; MSA 28.979. There was no dispute as to the burning of the dwelling house or the resulting death of Ruth Turner, but Respondent Fuller's conviction required proof beyond a reasonable doubt either that he intended wilfully and maliciously to aid in burning the house or that he knew Meadows had such an intent and aided him. Because intent is rarely capable of direct proof, it may, of course, be inferred from all of the surrounding circumstances.

Evidence was adduced at the trial which, if believed by the jury, was clearly sufficient to support the inference that Respondent wilfully aided the perpetration of an arson. Although Fuller's mother gave alibi testimony, three other eye witnesses identified Fuller at the scene of the crime and implicated him in the arson murder. There was no evidence of a gasoline can at the scene, and so the jury could have inferred that the perpetrators prepared the Molotov cocktail in advance and brought it with them intending to use it to burn the house. Fuller was identified as one of the group approaching the Turner house just before the arson, he was identified as being present in front of the house and then accompanying Meadows to the rear and standing as a lookout while the fires were started, and he was identified as fleeing from the scene immediately thereafter. The defense did not challenge the fact of the arson murder, but merely attacked the credibility of the prosecution witnesses and asserted alibi. Thus, intent was never at issue since, as defense counsel stated in argument to the jury, Transcript 50:

> "The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact that you have to determine."

The state court jury was properly instructed regarding the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the elements of the offense. The conviction was affirmed on appeal and it even appears that the Michigan Supreme Court applied an unduly restrictive standard of review in reaching that result, *People* v *Fuller, supra*, 395 Mich at 453:

> "It is for the trier of fact to determine if the prosecution has 'negate[d] every reasonable theory consistent with the defendant's innocence of the crime charged.' It was so determined in this case."

In *Jackson* v *Virginia, supra*, 443 US at 326, this Court specifically declined to adopt such a stringent standard. Because the state court applied a standard of review even more strict than is required by the Constitution, the state court determination is "entitled to great weight." *Jackson* v *Virginia, supra*, 443 US at 322, fn 15.

It thus appears that Defendant challenged only the identity of the perpetrator of the arson murder. By the jury's verdict, the factual conflict of the perpetrator's identity was conclusively resolved against Respondent Fuller. Under the standard enunciated in *Jackson* v *Virginia, supra*, 443 US 307, the evidence must be viewed in the light most favorable to the prosecution and it must be presumed that the trier of fact resolved conflicting inferences in favor of the prosecution. Under this standard, it is readily apparent that a rational jury could have concluded that Respondent Fuller intentionally aided the commission of an arson when he ap-

proached the Turner household in the company of several other youths, when he entered the yard and went to the rear of the house, when he stood guard and acted as a look-out while another youth actually lit the fires, and when he and the others fled together from the scene while the fire destroyed the house and took the life of Ruth Turner. Although other interpretations of the historical facts might have been possible, they must be disregarded in this habeas corpus proceeding in which the court is required to evaluate the case in the light most favorable to the prosecution. ***Jackson*** v ***Virginia, supra.***

The Court has said that in reviewing the sufficiency of evidence in a habeas corpus proceeding, the court may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt, ***Jackson*** v ***Virginia, supra,*** 443 US at 318-319, but that is precisely what the Court of Appeals did in the instant case. The entire thrust of the Court of Appeals' opinion demonstrates that its primary concern was not in construing the facts and conflicting inferences in the light most favorable to the prosecution, but rather was with assailing the credibility of the prosecution witnesses. The Court went to great lengths to attack the credibility of prosecution witness Jefferey Coleman, and even included a purported summary of Coleman's testimony in the separate trial of Zerious Meadows. ***Fuller*** v ***Anderson, supra,*** .... F2d at ...., fn 4 and accompanying text; App. 7a. It must be noted that the information pertaining to the trial of Zerious Meadows is not a part of the record in the instant case, either in the state court trial of Respondent Fuller or in this habeas corpus proceeding. The only reference to that purported testimony is found in the brief filed on behalf of Respondent Fuller by the Michigan State Appellate Defender in support of Fuller's application for leave to appeal to the Michigan Supreme Court. The fact that the Court of Appeals in the

instant case would grasp at such a thin reed indicates the lengths to which it was prepared to go in ordering Fuller's release. The Court also appeared to be concerned that Fuller had already served at least nine years of his sentense, *Fuller* v *Anderson*, *supra*, ... F2d at ....; App. 2a, a fact which bears absolutely no relevance to the question of constitutional sufficiency of the evidence.

The District Court acknowledged that there was sufficient evidence to suggest that Fuller was acting as a lookout for Meadows and even acknowledges the reasonableness of such a view. App. 10a, 26a. Instead of recognizing this as a legitimate inference from which the jury could have concluded that Fuller knowingly participated in the arson, the Court belittled it as mere "speculation" and failed to perform its mandatory duty to presume that the trier of fact resolved the inference in favor of the prosecution, *Jackson* v *Virginia*, *supra*, 443 US at 326:

> "... a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution and must defer to that resolution."

CONCLUSION

While there is no direct evidence of Respondent Fuller's intent, no such evidence is necessary to sustain the conviction since it is an elementary principle of law that intent may be inferred in appropriate circumstances. In the instant case, there was clearly sufficient evidence from which the jury could have inferred that Fuller intentionally aided the commission of an arson. In this habeas corpus proceeding,

the Court is required to presume that the jury inferred that Respondent Fuller acted wilfully in aiding the arson and is required to defer to that interpretation of the evidence. Once the factual question of Respondent Fuller's wilful participation has thus been resolved in the prosecution's favor, the only function of a federal habeas corpus court is to determine whether such wilful participation constitutes sufficient evidence to support the arson conviction, and it cannot be doubted that one who wilfully acts as a lookout during the perpetration of an arson is himself guilty of arson under Michigan law.

There are really two questions presented by this case: Was there sufficient evidence for the jury to convict Fuller of wilfully aiding the arson and, if so, should the jury have convicted him. Only the former question may be litigated in this habeas corpus proceeding. Petitioner submits that the court below granted habeas corpus relief because it impermissibly answered the second question in the negative based on its own subjective evaluation that Fuller should not have been convicted. Under the guise of a constitutional determination on the sufficiency of evidence, the court has thus invaded the exclusive province of the jury to examine the credibility of witnesses and to resolve conflicting factual inferences. A convicted murderer has thus been freed because a federal habeas corpus court believed that a state court jury wrongly interpreted the evidence adduced at trial. Petitioner submits that when that evidence is properly evaluated under the standard of *Jackson* v *Virginia, supra,* it becomes readily apparent that there is sufficient evidence for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt.

RELIEF SOUGHT

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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